Supreme Court, U.S.
FILED
JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1278

IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1989

No. _____

LEONARD MERKOW, M.D.
Petitioner,

v.

JOHN C. LAWN,
ADMINISTRATOR OF THE DEA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD
Counsel for Petitioner,
Leonard Merkow, M.D.

GREENFIELD & ASSOCIATES
Greenfield Court
1035 Fifth Avenue
Pittsburgh, PA 15219
Telephone: 412-261-4466

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should decide an important issue of federal law, reached for the first time by the within decision of the Third Circuit Court of Appeals, in conflict with this Court's holding in Richardson v. Perales, 402 U.S. 389, (1971), which decision permitted the goverment, in one of several administrative proceedings initiated by a joint federal-state drug task force against the Petitioner, to use hearsay statements of a now-deceased declarant in a hearing to revoke Petitioner's DEA license, after denying the Petitioner the opportunity to cross-examine the then-living declarant on those very hearsay statements in an earlier administrative hearing before a different agency?

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled Leonard Merkow, M.D., Petitioner, v. John C. Lawn, Administrator of the Drug Enforcement Administration, Respondent, at No. 89-3260.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	1
Parties To This Proceeding In The Court Below	2
Table Of Contents And Table of Authorities	3
Opinions Below	5
Statement of Jurisdiction	6
Statutory Provisions Involved In This Case	7
Statement Of The Case	16
Reasons Relied Upon For The Allowance of the Writ	24
Conclusion	33
Certificate Of Service	34

Appendix:

(1)	Opinion and Judgment Of The Third Circuit Court of Appeals Dated November 2, 1989	1a
(2)	Ruling of the Administrator of the DEA	3a

TABLE OF CONTENTS

PAGE

(3) Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge 13a

TABLE OF AUTHORITIES

PAGE

CASES

California v. Green, 399 U.S. 149 (1970) 26

Goldberg v. Kelly, 397 U.S. 254 (1970) 29

Richardson v. Perales, 402 U.S. 389 (1971) 1,27,29,30

STATUTES

5 U.S.C. § 556 (d) 27

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an Opinion and Judgment on November 2, 1989 A copy of the Opinion is contained in the Appendix at pps.1a-3a. The Administrator of the Drug Enforcement Administration issued a Ruling in the matter of Leonard Merkow, M.D., Docket No. 88-39, which Ruling was published in the Federal Register, Volume 54, Number 61, on Friday, March 31, 1989. A copy of that Ruling appears in the Appendix at pps. 3a-13a. The Adminstrative Law Judge, in The Matter of Leonard Merkow, M.D., Docket Number 88-39, issued an Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision on January 5, 1989. A copy of the document appears in the Appendix at pps. 13a- 28a.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit was entered on November 2, 1989. The judgment is thus final with respect to the issues presented herein.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 5, United States Code, Section 556 (d) provides:

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on a consideration of the whole record or those parts therof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider of violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and truue disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial

licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Title 21, United States Code, Section 823 (f) provides:

> **(f) Research; pharmacies; research applications; construction of Article 7 of the Convention on Psychotropic Substances.** The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with, controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws of the State in which he practices. The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:
>
> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Separate registration under this part [21 USCS §§821 et seq.] for practitioners engaging in research with controlled substances in schedule II, III, IV, or V, who are already registered under this part [21 USCS §§821 et seq.] in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be

denied by the Attorney General only on a ground specified in section 304 (a) [21 USCS § 824 (a)]. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the convention which is conducted in conformity with this subsection and other applicable provisions of this title.

Title 21, Section 824 United States Code, provides:

§824. Denial, revocation, or suspension of registration

(a) Grounds. A registration pursuant to section 303 [21 USCS § 823] to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant--

(1) has materially falsified any application filed pursuant to or required by this title or title III;

(2) has been convicted of a felony under this title or title III or any other law of the United States, or of any State, relating to any substance defined in this title as a controlled substance;

(3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no

longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation, or denial of his registration recommended by competent State authority;

(4) has committed such acts as would render his registration under section 303 [21 USCS § 823] inconsistent with the public interest as determined under such section; or

(5) has been excluded (or directed to be excluded) from participation in a program pursuant to section 1128(a) of the Social Security Act [42 USCS § 1320a-7(a)] A registration pursuant to section 303(g) [21 USCS § 823(g)] to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 303(g) [21 USCS § 823(g)].

(b) Limits of revocation or suspension. The Attorney General may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Service of show cause order; proceedings. Before taking action pursuant to this section, or pursuant to a denial of registration under section 303 [21 USCS § 823], the Attorney General shall

serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of title 5 of the United States Code [5 USCS §§ 551 et seq.]. Such proceedings shall be independent of, and not in lieu of criminal prosecutions or other proceedings under this title or any other law of the United States.

(d) Suspension of registration in cases of imminent danger. The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety. A failure to comply with a standard referred to in section 303(g) [21 USCS § 823(g)] may be treated under this subsection as grounds for immediate suspension of a registration granted under such section. A suspension under this subsection shall continue in effect until the conclusion of such proceedings, including

judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.

(e) Suspension and revocation of quotas. The suspension or revocation of a registration under this section shall operate to suspend or revoke any quota applicable under section 306 [21 USCS § 826].

(f) Disposition of controlled substances. In the event the Attorney General suspends or revokes a registration granted under section 303 [21 USCS § 823], all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of sale deposited in court) shall be forfeited to the United States; and the Attorney General shall

dispose of such controlled substances in accordance with section 511(e) [21 USCS § 881(e)]. All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.

(g) Seizure or placing under seal of controlled substances upon expiration of registration or cessation of practice or business. The Attorney General may, in his discretion, seize or place under seal any controlled substances owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by his registration. Such controlled substances shall be held for the benefit of the registrant, or his successor in interest. The Attorney General shall notify a registrant, or his successor in interest, who has any controlled substance seized or placed under seal of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The Attorney General may not dispose of any controlled substance seized or placed under seal under this subsection until the expiration of one hundred and eighty days from the date such substance was seized or placed under seal.

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch III, Part B, § 304, Ch V, Part B,

§§ 512, 513, 98 Stat. 2050, 2073; Aug. 18, 1987, P. L. 100-93, § 8(j), 101 Stat. 695.)

Title 63, Pennsylvania Statutes Annotated, Section 422.40 (a) provides:

(a) Temporary suspensions.- A license or certificate issued under this act may be temporarily suspended under the circumstances as determined by the board to be an immediate and clear danger to the public health and safety. The board shall issue an order to that effect without a hearing, but upon due notice, to the licensee or certificate holder concerned at his or her last known address, which shall include a written statement of all allegations against the licensee or certificate holder. The provisions of section 9 (Section 422.9 of this title) shall not apply to temporary suspension. The board shall thereupon commence formal action to suspend, revoke or restrict the license or certificate of the person concerned as otherwise provided in this act. All actions shall be taken promptly and without delay. Within 30 days following the issuance of an order temporarily suspending a license, the board shall conduct or cause to be conducted a preliminary hearing to determine that there is a prima facie case supporting the suspension. The licensee or certificate holder whose license or

certificate has been temporarily suspended may be present at the preliminary hearing and may be represented by counsel, cross-examine witnesses, inspect physical evidence, call witnesses offer evidence and testimony and make a record of the proceedings. If it is determined that there is not a prima facie case, the suspended license shall be immediately restored. The temporary suspension shall remain in effect until vacated by the board, but in no event longer than 180 days.

STATEMENT OF THE CASE

Procedural

On March 22, 1988, agents of the Drug Enforcement Administration Task Force served the Petitioner, Leonard Merkow, M.D., with an emergency order revoking his DEA license, pursuant to 21 U.S.C § 824 (d), and with an emergency order, pursuant to 63 Pa.C.S.A. § 422.40, revoking his state license to practice medicine.

At the same time the agents served and executed search warrants for the Petitioner's home and offices. Agents requested and received permission from the Petitioner to search his automobile, a 1983 Lincoln Town Car. Following the search the same agents then seized the automobile and a civil forfeiture proceeding was initiated by the United States Attorney for the Western District of Pennsylvania.

On September 8 and 9, 1988, a hearing on the revocation of the DEA license was held in Pittsburgh, Pennsylvania, before Administrative Law Judge Francis L. Young. On January 5,

1989 the Opinion of Judge Young was rendered, recommending the revocation of the Petitioner's DEA license. On March 31, 1989, the Administrator of the DEA adopted the opinion and recommendation of Administrative Law Judge Young and Petitioner's DEA license was revoked.

On April 20, 1989, the Petitioner sought review of the Administrator's Ruling by the Third Circuit Court of Appeals. On November 2, 1989 the Third Circuit rejected Petitioner's arguments.

This Petition for Writ of Certiorari to the Third Circuit Court of Appeals followed.

Factual

On or about October 24, 1987, one Patrick Noon was arrested by the Oakdale, Pennsylvania police department and charged with driving under the influence of alcohol or controlled substances. Noon, who was first arrested in 1970, was then on parole for a felony conviction. In the hope of gaining some leniency with the arresting authorities, Noon told the authorities that he received prescriptions for the controlled substances for no medical reason from a practitioner whose office was in Oakdale, Leonard Merkow, M.D. Noon was referred by the Oakdale

police to agents of the Drug Enforcement Administration. From that time, until March 16, 1988, Noon entered Dr. Merkow's office 13 times wearing a recording device.

Noon, who was born November 21, 1951, first presented himself to the Petitioner for medical treatment in September of 1986. Noon recited an extensive medical history and presented the Petitioner with medical records that documented a history of bilateral cancer of the testicles, which disease was first detected in 1979, and which was treated by various practitioners at local hospitals with appropriate surgery and chemotherapy over the following five year period.

When Noon presented to the Petitioner his chief complaint was of chronic abdominal pain and intestinal distress. In the course of treatment the Petitioner obtained a CAT scan of Noon's back and abdomen which revealed numerous adhesions of the internal organs and a ruptured lumbar disc. The Petitioner testified that based on his physical examination, test results and Noon's medical history, he diagnosed Noon as

suffering from chronic pain as a sequella of the chemotheraphy and surgery, which condition would be lifelong, in the Petitioner's opinion, and not amenable to cure.

The Petitioner's treament regimen consisted of permitting Noon to self-medicate with small doses of controlled substances for pain and for sleeping. This regimen required the Petitioner to frequently monitor Noon for symptoms of noncompliance.

On April 18, 19 and 20, 1988, a hearing was held in Pittsburgh, Pennsylvania, by the Pennsylvania State Board of Medicine on the emergency revocation of the Petitioner's state license to practice medicine. At that hearing Patrick Noon testified on behalf of the State Board of Medicine, as did Agent Anthony F. Iorio, an employee of the Commonwealth of Pennsylvania, then on loan to the DEA. At that hearing Noon testified that he had been a drug addict for years, but that he was currently drug free and receiving counseling in order to remain so. Noon testified that there was no medical reason for him to receive any of the controlled substances which the

Petitioner prescribed for him. He did not deny, however, giving the Petitioner the symptomology previously described. Noon was questioned by counsel for the Petitioner concerning the existence of tapes of conversations between himself and the Petitioner. Noon confirmed the existence of the tapes and testifed that he had not listened to the tapes - since the conversations were recorded. Counsel for the Petitioner was then foreclosed from further inquiry into the substance of the tapes because the State Board of Medicine, after consultation with the office of the United States Attorney for the Western District of Pennsylvania, declined to put the tapes into evidence for tactical reasons.

At the conclusion of the hearing, Hearing Examiner Kenneth Hirsch found in favor of the Petitioner, and, in addition, made a specific finding that Patrick Noon was not a credible witness, but rather one whose testimony could be relied upon only where there was independent corroborating evidence. Hearing Examiner Hirsch specifically found that vigorous cross-examination of Mr. Noon was necessary in order to arrive at the truth of

the various matters to which Mr. Noon testified.

After the state licensing hearing and before the DEA hearing, Patrick Noon died of a combined overdose of codeine and gluthethimide.

At the DEA hearing, Agent Anthony F. Iorio and DEA Agent Leonard Dombroski testified to essentially the same evidence offered at the hearing before the State Board of Medicine. Prior to the DEA hearing the Government moved to amend its prehearing statement to permit the inclusion of hearsay testimony by Agent Iorio concerning statements the now-deceased Patrick Noon made to him, as well as the tapes and transcriptions of the tapes made by Noon on his visits to the Petitioner.

Petitoner strongly objected to the admission of this hearsay evidence. Petitioner based his objections on three grounds. First, the remedy available to one who objects to the admission of hearsay evidence is to subpoena the declarant for cross-examination. This remedy was obviously not available to Petitioner. Second, Noon had been previously demonstrated to be an incredible witness

whose duplicity was revealed only after vigorous cross-examination. Third, the Government had had ample opportunity at the State Board of Medicine hearing, to present Noon to the Petitioner for cross-examination on the matters sought to be admitted as hearsay in the DEA hearing but had declined to do so for tactical reasons. The Government was in the position of having effectively blocked Petitioner from reaching the truth of Noon's testimony through cross-examination, while, at the same time, getting the benefit of that testimony without running the risk of cross-examination.

Petitioner contended then, as now, that the hearsay contained in those tapes and transcripts was unreliable, not as to content but context. It was Petitioner's contention that Noon had stage-managed the taped conversations, deliberately trying to involve the Petitioner in conversations concerning illicit activities, well-knowing that the conversations did not accurately reflect the relationship between Noon and Petitioner. Administrative Law Judge Young permitted the admission of the evidence.

On January 23, 1989, a civil trial on the government's complaint to forfeit the Petitioner's automobile was held in the United States District Court for the Western District of Pennsylvania, at civil action number 88-1905, before the Honorable Maurice Cohill. At that trial Agent Anthony F. Iorio testifed on behalf of the government. The government did not seek the admission of the tapes or the transcripts. Judge Cohill ruled in favor of Petitioner.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THIS COURT SHOULD SETTLE THE IMPORTANT ISSUE OF FEDERAL LAW, REACHED FOR THE FIRST TIME BY THE WITHIN DECISION OF THE THIRD CIRCUIT COURT OF APPEALS, WHICH DECISION PERMITS THE GOVERNMENT, IN ONE OF SEVERAL ADMINISTRATIVE PROCEEDINGS INITIATED BY A JOINT FEDERAL-STATE DRUG TASK FORCE, AGAINST THE PETITIONER, TO USE HEARSAY EVIDENCE OF A NOW-DECEASED DECLARANT IN A HEARING TO REVOKE PETITIONER'S DEA LICENSE, AFTER DENYING THE PETITIONER THE OPPORTUNITY TO CROSS-EXAMINE THE THEN-LIVING DECLARANT ON THOSE VERY HEARSAY STATEMENTS IN AN EARLIER ADMINISTRATIVE HEARING BEFORE A DIFFERENT AGENCY.

Petitioner herein is a medical practitioner who sometime in October of 1987, became the target of a joint anti-drug task force comprised of state and federal drug agents. The task force elected to proceed against the Petitioner on several

fronts at the same time. On March 22, 1989 the task force served Petitioner with orders seeking the emergency revocation of Petitioner's state license to practice medicine, and his federal license to prescribe controlled substances while, at the same time, seizing an automobile with the intention of forfeiting that vehicle to the government. While each of the three actions was prosecuted by different counsel, the investigating and managing agents on the case were the same, the witnesses were the same and the evidence was the same. The parties in each proceeding were the joint task force and the Petitioner.

The task force planned a multi-faceted attack on Petitioner, seeking to use the same witnesses and evidence in the different fora to effect a revocation of Petitioner's state license to practice medicine, a revocation of Petitioner's DEA license, which permitted the Petitioner to prescribe controlled substances to patients within the scope of the doctor-patient relationship, and to forfeit to the government an automobile which the task force contended was used illicitly by Petitioner to transport controlled

substances. At each proceeding the government sought to use the same evidence and the same witnesses to prove that Petitioner was prescribing controlled substances to individuals which prescriptions were issued for no valid medical purpose. Agent Anthony F. Iorio and Patrick Noon testified at the administrative hearing before the Pennsylvania Board of Medicine. The hearing examiner specifically found Mr. Noon was incredible.

By the time of the DEA hearing, Mr. Noon was dead of a drug overdose. At that hearing the government sought to use, not the testimony of Mr. Noon from the earlier hearing, a procedure approved by this Court in California v. Green, 399 U.S. 149 (1970), but hearsay statements of Mr. Noon which statements had not been subjected to the test of cross-examination. Even more egregious, it was the government itself which had prevented the Petitioner from cross-examining Mr. Noon on those very matters on which Agent Iorio was allowed to offer substantive evidence in the form of Mr. Noon's hearsay statements. In other words, the

government was permitted to have its cake and eat it too.

It is undisputed that under the current state of federal case law, hearsay evidence may be admitted in administrative hearings. Richardson v. Perales, 402 U.S. 389, 402 (1971). The administrative Practices Act, 5 U.S.C. § 551 et seq., however, provides that due process protection is afforded anyone aggrieved by this practice by permitting that person to subpoena the declarant and to cross-examine said person to the extent necessary to provide "a full and true disclosure of the facts." 5 U.S.C. § 556 (d). Both the Administrative Practices Act and case law is silent on the issue of the admission of hearsay in an administrative hearing where the declarant is dead and the person against whom the hearsay testimony is offered, has compelling reasons for doubting the reliability of the hearsay. The Third Circuit Court of Appeals permitted the decision of the Administrator based on the admission of this evidence to stand without ruling on this issue.

The instant action presents a question of bedrock fundamental fairness.

In any administrative proceeding the government is both the prosecutor and the judge. While there is a physical distinction between the two when different persons perform the same function, there is an identity if the judge is merely a rubber stamp for the prosecuting attorney. The Administrative Law Judge ruled that the tapes and transcripts were admissible because he believed that the audible portions of the tapes were fairly transcribed and fairly represented the substance of the conversations between Noon and Petitioner. This ruling begs the question and does not address the issue of concern to Petitioner. That the tapes may represent the conversations on them in no way reduces the unfair prejudice to the Petitioner in their being used as substantive evidence, since the conversations on the tapes were constructed and manipulated by Noon and are fairly subject to varying interpretations, depending upon the context and the past relationship of the speakers. That this procedure was in fact highly and unfairly prejudicial to Petitioner is evidence by the fact that Administrative Law Judge Young

designated as substantive evidence, those statements from the tapes which to him tended to inculpate Petitioner, and rejected out of hand those statements made on the tape by Noon and others which patently exculpated Petitioner. In the absence of a cross-examination to establish context and the past relationship of the speakers, the tapes, or any form of hearsay evidence, becomes, not evidence of fact, but a tool to reach a desired conclusion.

In Goldberg v. Kelly, 397 U.S. 254 267-8 (1970) this Court held that an effective opportunity to defend by confronting adverse witnesses is required in an administrative hearing where credibility and veracity are at issue. Credibility and veracity are generally not at issue where the hearsay is of a type historically recognized as reliable and where the declarants are absolutely disinterested, as for instance, reports by physicians. Richardson v. Perales 402 U.S. 389 (1971).

The hearsay statements complained of here came from a source previously determined to be incredible. Veracity was very much at issue with Mr. Noon. It was clearly in Mr. Noon's best interest to have

the proceeding terminate in favor of the government. His interest in the proceeding was thus clearly adverse to Petitioner and he could hardly be said to have been disinterested. Nor can the admission of this evidence be said to be harmless. Although the government had originally focused on Petitioner's treatment of some twenty different patients, in the end, the Administrator revoked Petitioner's license based on the statements of Noon, offered as hearsay by Agent Iorio. The position taken by Adminstrative Law Judge Young and approved by the Third Circuit Court of Appeals is in direct conflict with the reasoning of this Court in Goldberg v. Kelly, supra, and Richardson v. Perales, and is at odds with the concept of fundamental fair play inherent in the federal constitution.

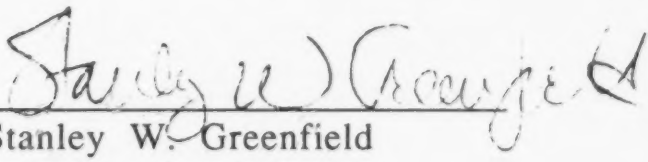
It is imperative that this Court define the proper procedure for the admission of hearsay evidence in an administrative proceeding when the declarant is unavailable, and is challenged as being both incredible and biased. This issue is fundamental to the fairness of administrative proceedings which are widespread in the federal system. These proceedings lack many of the strict

safeguards of judicial proceedings yet often result in a taking or restricting of important interests protected by the Constitution of the United States. We respectfully submit that unless this Court rules on this issue, the door is open for the unscrupulous manipulation of evidence in administrative proceedings by the government, with no recourse by the citizens so aggrieved.

CONCLUSION

This court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit to decide the admissibility of hearsay evidence in administrative proceedings where the evidence is challenged as to both credibility and bias and where the government had had an opportunity to use the evidence when the declarant was available, but chose not to, for tactical reasons.

Respectfully submitted,
GREENFIELD & ASSOCIATES



Stanley W. Greenfield
Attorney for Petitioner
Leoard Merkow, M.D.

1035 Fifth Avenue
Pittsburgh,Pennsylvania 15219
Telephone: 412-261-4466

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 30th day of January, 1990, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORAR TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

Charles Fried
Solicitor General
United States Department
of Justice
Room 5143
Main Justice Building
Washington, D.C. 20530

for any legitimate medical purpose. In fact, in one conversation, after Mr. Noon requested "fours and dors," Respondent replied, "we're all going to jail."

In addition to the prescriptions Mr. Noon received from Respondent, Mr. Noon also received controlled substances from the receptionist at Respondent's office on a number of occasions. Some of these occasions were times when Mr. Noon also obtained prescriptions from the Respondent. From late October 1987, to late December 1987, Mr. Noon obtained from the receptionist more than 300 tablets of Valium, a Schedule IV substance, and 144 Doriden tablets. The Administrative Law Judge was unswayed by Respondent's testimony at the hearing in which he disclaimed any knowledge of these transactions between his receptionist and Mr. Noon. The Administrative Law Judge found that Respondent is properly faulted for these transactions. Respondent ordered large quantities of controlled substances for dispensing in his practice amounting to almost 200,000 dosage units in nine months in 1987. Respondent is responsible for the proper dispensing and accounting for these controlled substances. Indeed, Respondent testified at the hearing that he stored the controlled substances at his home and only brought them to his office as needed. Respondent presented no evidence to rebut the Government's

Margaret A. Grove, Esquire
U.S. Department of Justice
Narcotics and Dangerous Drugs
Section
P.O. Box 27312
Washington, D.C. 20038

GREENFIELD & ASSOCIATES

Stanley W. Greenfield,
Attorney for Petitioner
Leonard Merkow, M.D>

SWORN to and subscribed before me

this 30th day of January, 1990.

Notary Public

My Commission Expires:

NOTARIAL SEAL
JANE C. DINDINGER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES JUNE 7, 1992
Member, Pennsylvania Association of Notaries

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3260

LEONARD MERKOW, M.D.
Petitioner,

v.

JOHN C. LAWN,
ADMINISTRATOR OF THE
DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

ON PETITION FOR REVIEW OF THE
FINAL ORDER OF THE ADMINISTRATOR OF
THE DRUG ENFORCEMENT
ADMINISTRATION
DEA Docket No. 88-39

Submitted Under Third Circuit Rule 12 (6)
October 19, 1989

BEFORE: BECKER, COWEN and SEITZ, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, and

It appearing to the court that the Adminstrator's order revoking petitioner's DEA Certificate of Registration and denying his pending application of renewal contains no legal error and is supported by substantial evidence on the record as a whole, it is

ADJUDGED AND ORDERED that the petition for review be and is hereby denied.

Costs taxed against Petitioner.

BY THE COURT:

/s/ Seitz
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvow, Clerk

DATED: Nov. 2, 1989

Federal Register/ Vol. 54, No. 61
Friday, March 31, 1989/Notices

Drug Enforcement Administration

[Docket No. 88-39]

Leonard Merkow, M.D.; Revocation of Registration

On March 22, 1988, the Administrator of the Drug Enforcement Administration (DEA), issued an Order to Show Cause to Leonard Merkow, M.D., of 5301 Darlington Road, Pittsburgh, Pennsylvania, proposing to revoke his DEA Certificate of Registration AM5075305. The Order to Show Cause alleged that the continued registration of Respondent would be inconsistent with the public interest, as set forth in 21 U.S.C. 823(f) and 824(a)(4). Additionally, citing his preliminary finding that Respondent's continued registration posed an imminent danger to the public health and safety, the Administrator ordered the immediate suspension of the registration pending the outcome of these proceedings. U.S.C. 824(d).

Respondent, through counsel requested a hearing in a letter dated March 31, 1988. The matter was docketed before Administrative Law Judge Francis L. Young. Following prehearing procedures, a hearing was held in Pittsburgh, Pennsylvania on September 7 and 8, 1988. On January 5, 1989, the Administrative Law Judge issued his opinion and recommended ruling. On January 23, 1989, counsel for the Respondent filed exceptions to the recommended ruling. On February 13, 1989, the Government filed a

response to Respondent's exceptions and on February 15, 1989, Judge Young transmitted the record of these proceedings, including the aforementioned exceptions, to the Administrator. The Administrator has considered the record in its entirety and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

Respondent is a physician to practice medicine in the State of Pennsylvania. Among Respondent's patients was one Patrick Noon. Patrick Noon first saw Respondent as a patient on August 9, 1986. Mr. Noon's medical history indicated that he was taking methadone and had been a drug addict. From August 9, 1986, to October 21, 1986, Mr. Noon's medical chart indicated that he visited Respondent's office on nine occasions and received prescriptions for controlled substances totalling 24 Percocet, 28 Halcion, 14 Vicodin, 26 Anexsia-D, and 52 Valium. On November 3, 1986, Patrick Noon began receiving prescriptions for Tylenol with Codeine #4 and Doriden.

Mr. Noon began working as a confidential informant for DEA following his arrest by the Oakdale Police Department in October 1987 for driving under the influence. Laboratory analysis revealed that Mr. Noon was driving under the influence of Valium and Doriden. Mr. Noon told DEA Agents

that he was a drug addict, had been a heroin addict since the age of 15, had been arrested several times, and had been receiving "fours and dors" from a physician in Oakdale for two years. "Fours and dors" is the street name given to the widely abused combination of Tylenol #4 (with codeine) and Doriden. Evidence presented at the hearing established that Respondent was well aware of the popularity of this combination of drugs with addicts and abusers, and that he was well aware of the danger of taking them together. In Western Pennsylvania the combination of Doriden and Tylenol with codeine is highly abused. In Erie, Pennsylvania, approximately 120 miles from Pittsburgh, there have been over 200 overdoses directly related to this combination of drugs.

Under the supervision of DEA Task Force Agents, Mr. Noon began to wear a concealed recording device when he visited the Respondent's office. Mr. Noon made thirteen such monitored visits to Respondent's office. On seven of these occasions Mr. Noon saw and talked with Respondent and received "fours and dors" prescriptions from Respondent. The Administrative Law Judge found that the transcripts of the conversations between the two men on these occasions make it perfectly clear that Respondent was not prescribing "fours and dors" for Mr. Noon

evidence that Mr. Noon was dispensed controlled substances by the receptionist whom he employed.

The administrative Law Judge found that Respondent unlawfully prescribed Tylenol #4 (with codeine) and Doriden, both Schedule III controlled substances to Mr. Noon and that Respondent permitted his receptionist to give Mr. Noon sizeable quantities of Valium and Doriden unlawfully.

The Administrative Law Judge also found that Respondent received, stored and dispensed controlled substances at unregistered locations. During all or part or the time pertinent to this proceeding. Respondent maintained three offices. He had an office at 15 State Street, Oakdale, Pennsylvania and another one at 3914 Nantasket Street, Pittsburgh, Pennsylvania. He also maintained an office in his home at 5301 Darlington Road, Pittsburgh. The Darlington Road address remained registered with DEA until the show cause and immediate suspension order was served on Respondent on March 23, 1988. The Oakdale registration lapsed on January 31, 1987, and was not renewed. The Nantasket Street office was not registered with DEA at any time.

During the entire period relevant in these proceedings, and for some years previously, Respondent received all shipments of controlled substances to be

used in his medical practice at his home. Respondent testified that for seventeen years, it was his routine to transport the controlled substances from his Darlington Road home to his Oakdale office where they would be dispensed to patients. Often controlled substances would be kept stored at home for some period of time until needed for dispensing at the Oakdale office. The Administrative Law judge found that it was unlawful for Respondent to dispense controlled substances from his Oakdale office after January 31, 1987, when his registration at that address lapsed. The Controlled Substances Act requires that a separate registration be maintained at each place of professional practice where the registrant dispense controlled substances. 21 U.S.C. 822(e). At the hearing, Respondent asserted that he was unaware of this requirement and would willingly have complied had he known of it. The Administrative Law Judge found that ignorance of the law is no excuse. Although Respondent's failure to maintain a registration at his Oakdale office, alone, would not be sufficient to warrant revocation of Respondent's DEA registration, the Administrative Law Judge found such failure to be another indication of his lack of fitness to hold a DEA registration.

The Administrative Law Judge also found that Respondent was convicted on

February 28, 1988, in a Pennsylvania State Court of 47 counts of submitting false Medicaid claims, felony violations of Pennsylvania law. This conviction arose from forty-seven separate instances during 1981 and 1982, in which Respondent submitted bills to Medicaid for x-rays, when, in fact, the x-rays actually taken did not meet the description of what was billed. Respondent was sentenced to three years probation, a $50,000 fine, restitution in the amount of $6,580, and investigative costs totalling $2,747.87. Respondent was given a public reprimand by the Pennsylvania Bureau of Professional and Occupational Affairs. The Administrative Law Judge found that although the circumstances leading up to Respondent's conviction in the state court may not, themselves, warrant revocation of a DEA registration, they show professional carelessness and neglect and are appropriately considered in determining whether Respondent should continue to be entrusted with a DEA registration.

Respondent's medical practice license was suspended by the State of Pennsylvania on March 22, 1988. This temporary suspension was based upon petition by an attorney for the Bureau of Professional and Occupational Affairs. The Administrative Law Judge noted that the Pennsylvania Bureau of Professional and Occupational Affairs reinstated Respondent's medical

practice license on April 20, 1988, after hearing. However, in light of the adverse evidence presented at this proceeding concerning Respondent's activities, the Administrative Law Judge gave little weight to the reinstatement of Respondent's license.

The final matter in support of the revocation of Respondent's DEA Certificate of Registration is the fact that Respondent received a shipment of controlled substances after his DEA registration had been suspended, and failed promptly to return them to the shipper or turn them over to DEA. On March 23, 1988 at approximately 5:30 p.m., Respondent was notified that his DEA Certificate of Registration had been suspended. Respondent was told that if he received any controlled substances subsequent to the suspension of his registration he should notify DEA. On March 23, 1988, Respondent ordered 19,200 dosage units of controlled substances. These drugs were delivered to Respondent by United Parcel Service (UPS) on March 28, 1988. Respondent did not advise DEA that a shipment of controlled substances had been delivered to him. On April 13, 1988, a search warrant was executed at Respondent's residence. The controlled substances from the shipment delivered on March 28, 1988, were not present.The substances were subsequently recovered

from Respondent's attorney's garage. Therefore, even though Respondent was specifically advised by DEA to notify them if he received such a shipment, he only notified his attorney and did not take any action to notify DEA.

No one may lawfully possess controlled substances in the United States except as authorized by the Controlled Substances Act, as amended, and regulations issued pursuant thereto. Respondent cited no authority for the claim that he or his attorney, more than two weeks after the delivery, was entitled to be in possession of these controlled substances. The Administrative Law Judge found that Respondent flouted the law with respect to the controlled substances he received after his DEA registration was summarily suspended.

Bases upon the foregoing, the Administrative Law Judge recommended that the Administrator revoke Respondent's Certificate of Registration. The Administrator may revoke a DEA Certificate of Registration if he determines that such registration is inconsistent with the public interest. Included among the factors to be considered in determining the public interest is an individual's experience in dispensing controlled substances, his compliance with applicable laws relating to controlled substances, and such other conduct when may threaten the public

health and safety. Respondent's experience in dispensing controlled substances is appalling. Respondent has a history of unlawfully dispensing prescriptions for Tylenol #4 (with codeine) and Doriden to an individual, and permitting his receptionist to give the same individual large quantities of Valium and Doriden tablets. Respondent's failure to comply with laws relating to controlled substances is evidenced by his lack of control over, and failure to keep records required for the controlled substances which he dispensed in his office; his failure to be properly registered with DEA to dispense controlled substances at his Oakdale office, and his prescribing of controlled substances for other than a legitimate medical purpose. The Administrative Law Judge also found that the circumstances leading up to Respondent's convictions in the state court and his fraudulent billing for x-rays under Medicaid constitute conduct threatening the public health and safety. Upon consideration of the factors set out in 21 U.S.C. 823(f), Respondent's registration is clearly in consistent with the public interest. The Administrator adopts the opinion and recommended ruling of the Administrative Law Judge that Respondent's Certificate of Registration be revoked.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AM5075305, previously issued to Leonard Merkow, M.D., be, and it hereby is, revoked. It is further ordered that any pending applications for renewal of said registrations be, and they hereby are, denied.

At the time the Order to Show Cause and Immediate Suspension were served on Respondent, all controlled substances possessed by Respondent under the authority of his then suspended registration were placed under seal until the time for disposition of this proceeding and taking appeals had elapsed. Accordingly, these controlled substances shall remain under seal until May 1, 1989, or until any appeal of this order has been concluded. At that time, all such controlled substances shall be forfeited to the United States and shall be disposed of pursuant to 21 U.S.C. 881(3).

This order is effective March 27, 1989.

John C. Lawn,

Administrator.

Dated: March 27, 1989.

[FR Doc. 89-7878 Filed 3-30-89: 8:45 a m]

BILLING CODE 441009-M

UNITED STATES DEPARTMENT OF JUSTICE
Drug Enforcement Administration

In the Matter of

Docket No. 88-39

LEONARD MERKOW, M.D.

OPINION AND RECOMMENDED RULING, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION OF ADMINISTRATIVE LAW JUDGE

INTRODUCTION

This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. § 551, et seq., to determine whether, pursuant to 21 U.S.C. §§ 823(f) and 824(a) (4), the Administrator of the Drug Enforcement Administration (DEA) should revoke a practitioner's registration. Without this registration the practitioner, Leonard Merkow, M.D., will be unable lawfully to prescribe or dispense certain drugs, controlled substances, in the course of his medical practice.

On March 22, 1988, the Administrator of the DEA issued an Order to Show Cause and Immediate Suspension of Registration to Leonard Merkow, M.D. (Respondent) proposing to revoke his DEA registration, AM5075305, and suspending that registration during the pendency of these proce3edings. The stated statutory predicate for the Order to Show Cause was that Respondent's registration with DEA is inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(f) and § 824(a)(4), based upon certain allegations set out in the order.

Respondent, through counsel, requested a hearing. Following prehearing procedures, a hearing was held in Pittsburgh, Pennsylvania on September 7 and 8, 1988. The Government called two witnesses and introduced 38 exhibits (including tape recordings and transcripts) into evidence. Respondent, assistged by counsel, testified in his own behalf and introduced 21 exhibits (including patient records) into evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and written argument. The Government filed a rebuttal to Respondent's proposed findings. The

administrative law judge has considered all of the evidence and all of these submissions.

ISSUE

Whether it is inconsistent with the public interest for Respondent to be registered with the Drug Enforcement Administration based on the following:

1. His prescribing and dispensing of congrolled substances, including Tylenol with Codeine #4 and Doriden, in combination, to individuals for no legitimate medical purpose and outside the course of professional practice.

2. His receipt, storage and dispensing of controlled substances at locations which were not registered by DEA.

3. His conviction, on February 26, 1986, in the Court of Common Pleas of Allegheny County, Pennsylvania of 47 counts of submitting false medicaid claims, felony violations of Pennsylvania law.

4. The emergency suspension of his license to practice medicine in the State of Pennsylvania by the Pennsylvania Board of Medical Examiners on March 22, 1988.

5. His receipt of controlled substances five days after suspension of his DEA Certificate of Registration, and his failure to return the controlled substances or surrender them to DEA.

RECOMMENDED RULING

It is recommended that the proposed findings and conclusions submitted to the administrative law judge be rejected by the Administrator except to the extent they are included in those hereinafter set forth for the reason that they are irrelevant, unduly repetitious, or not supported by a preponderance of the evidence. 21 C.F.R. § 1316.65(a)(1).

FINDINGS AND CONCLUSIONS

A

The first ground allegedly showing it to be inconsistent with the public interest for Respondent to be registered has to do with his prescribing of two controlled substances, in combination, for no legitimate medical purpose and outside the course of professional practice. The two substances are Tylenol #4 (with codeine)

and Doriden. The Tylenol preparation is in Schedule III. Doriden is in Schedule III.

The evidence establishes that these two substances are widely abused by addicts and drug dependent persons who take them in combination, and that among those people the combination of these two drugs in commonly referred to as "fours and dors." The evidence establishes that this combination is dangerous. See G-11, G-12 and G-13. The evidence establishes that Respondent was well aware of the popularity of this comination of drugvs with addicts and abusers, and that he was well aware of the danger of taking them together. See e.g., G-9(F) page 7, G-9(G) page 10 and G-9(H) pages 10 and 11. It is also established that Respondent realized it might be unlawful for him to be prescribing "fours and dors."

Doriden, the "dors" of "fours and dors," is a formulation of the drug glutethimide. It is an oral hypnotice which has been shown to be effective as such for three to seven days. The Physicians' Desk Reference (PDR), an authoritative source widely accepted as containing accurate information about medicinal drugs, states that glutethimide "is <u>not</u> indicated for

chronic administration. Should insomnia persist, a drug-free interval of one or more weeks should elapse before retreatment is considered. Attempts shoulld be made to find alternative nondrug therapy in chronic insomnia." (Emphasis is added.) The usual adult dosage is stated to be 0.25 to 0.5g at bedtime. G-10. "Chronic" means continuing for a long time or recurring frequently.

Amont Respondent's patients was one Patrick Noon. Respondent's own chart for Noon (R-10) shows that Respondent prescribed Doriden .5g tablets for Noon, 10 tablets at a time, on four occasions from November 3, 1986 to and including January 6, 1987 while simultaneously prescribing Tylenol #4 on three of these occasions. Respondent prescribed Tylenol #4 for Noon within six days of the fourth of these occasions. The chart shows that Respondent resumed prescribing "fours and dors", Tylenol #4 and Doriden (glutethimide), for Noon on July 30, 1987 and did so repeatedly on 18 occasions ending on March 16, 1988. Most of these occasions were within seven days or less of each other. This constitutes "chronic administration."

This evidence alone is not sufficient to overcome Respondent's testimony that he was prescribing legitimately for Noon, treating real complaints, even with the language quoted above from the PDR. A physician is not required by law to limit his employment of any drug to the statement concerning it found in the PDR.

However, in the instant case Noon began cooperating with the authorities in Ocxtober 1987 and he wore a concealed recording device when he visited Respondent's office on thirteen occasions. On seven of these occasions Noon saw and talked with Respondent and received "fours and dors" prescriptions from Respondent. The transcripts of the conversations between the two men on these occasions make it perfectly clear that Respondent was not prescribing "fours and dors" for Noon for any legitimate therapeutic purpose. See G-9(B), G-9(D), G-9(F), G-9(G), G-9(H), G-9(I) and G-9(M).

B

In addition to the prescriptions Noon received from Respondent, Noon also bought controlled substances from

Respondent's receptionist at Respondent's office on a number of occasions. Some of these occasions were times when Noon also obtained prescrriptions from Respondent and some were not. From late October 1987 to late December 1987 Noon obtained from the receptionis more than 300 tablets of Valium, a Schedule IV substance, and 144 Doriden tablets. There was not the slightest indication of any legitimate medical need for these drugs.

Respondent disclaims any knowledge of these transactions between his receptionist and Noon. Indeed, the transcripts indicate in one or two places that the re4ceptionist wanted her selling of pills to be kept secret from Respondent, her employer. But Respondent is properly faulted for this activity nonetheless. He had purchased these substances, in very large quantities from a wholesale distributor. It was his duty to keep track of all of them and to account for them. 21 U.S.C. § 827(a)(3); 21 C.F.R. § 13304.03(b). He was obviously not doing this if his employee was regularly selling them in the quantities shown here without detection by Respodndent. Respondent effectively

made these drugs available, provided them, to Noon.

C

The Government asserts that Respondent wrognfully prescribed controlled substances, including Valium, Doriden and preparations containing codeine, to Roy Glasser, Steven Weisberg and Daniel Ohl. In light of Respondent's unrebutted testimony concerning these patients, their conditions and the treatment he was giving them, the preponderance of the evidence fails to establish that the drugs prescribed for them were prescribed for no legitimate medical purpose.

The Government asserts that Respondent wrongfully prescribed Tylenol #4 for Betty Domek, pointing out frequent prescriptions, sometimes only about ten days apart, over period of more than two years, July 1984 to September 1986, with subsequent visits on December 18, 1986 and January 13, 1987. Respondent, testifying from his chart for this patient, maintains that these prescriptions were all properly written for pain resulting from an

in jury to the coccyx, abuse by her husband and kidney stones. She had other ailments in addition. There is no evidence tending to rebut Respondent's testimony as to his exercise of professional judgement.

The Government points out that a hospital record dated January 7, 1987 refers to this patient as "a chronic analgesic abuser times many years" and states:

Psychiatric consult was obtained to evaluate the patient's history of codeing/use/abuse. Druing the course of hospitalization, the patient was tapered to 15 mg. of Codeine Q8 hours. The patient was also encouraged to become involved with Narcotics Anonymouse and perhaps family therapy. Social Service consult was obtained to help patient to become involved in these activities. R-5.

The hospital discharge dianoses included: "Questionable narcotic and hypnotic abuse."

Respondent testified under oath that Ms. Domek, in his opinion, was not dependent on any medication he prescribed for her. The hearsay hospital record is insufficient to overcome this sworn testimony. The preponderance of

the evidence does not establish that Respondent unlawfully prescribed for Betty Domek.

D

The second ground allegedly showing Respondent's registration to be inconsistent with the public interest is that Respondent received, stored and dispensed controlled substances at unregistered locations. During all or part of the time pertinent to this proceeding, Respondent maintained three offices. He had an office at 15 State Stret, Oakdale, Pennsylvania and another one at 3944 Nantasket Street Pittsburgh, Pennsylvania. He also maintained an office in his home at 5301 Darlington Road, Pittsburgh. The Darlington Road address remained registered with DEA until the show cause and immediate suspension order was served on Respondent on March 23, 1988. The Oakdale registration lapsed on January 31, 1987 and was not renewed. The Nantasket Street office was not registered at any time, insofar as the record reveals.

During the entire period of time with which we are concerned in these

proceedings, and for some years previously, Respondent received at his home 5301 Darlington Road, Pittsburgh, all shipments of controlled substancesa to be used in his medical practice. Most, if not all, of his dispensing of these drugs, i.e., actually, physically, giving them to patients, occurred at his office in Oakdale. For 17 years, Respondent testified, it was his routine to transport the controlled substances from his Darlington Road home to his Oakdale office where they would be given to patients. Often controlled substances would be kept stored at home for some period of time until needed for dispensing at the Oakdale office.

It was unlawful for Respondent to dispense controlled substances from his Oakdale office after January 31, 1987 when his registration at that address lapsed. The controlled Substances Act requires that a separate registration be maintained at each place of professional practice where the registrant dispenses controlled substances. 21 U.S.C. § 822(E). Respondent asserts that he was unaware of this requirement and would willingly have omplied had he known of it. But ignorance of the law is no excuse. Respondent's

failure to inform himself of the legal strictures laid upon him as a physician using controlled substances in his practice is consistent with his admitted negligence in not keeping himself informed as to the status of the supplies of these substances which he brought to his Oakdale office from his home.

Respondent's failure to maintain a registration at his Oakdale office along, would not be sufficient to warrant revocation of the subject DEA registration in light of the circumstances here. It is, however, in the oeverall context of this case, another indication of his unfitness to hold a DEA registration.

E

The third ground relied on by the Government is Respondent's conviction of February 26, 1986 in a Pennsylvania State court of 47 counts of submitting false medicaid claims, felony violations of Pennsylvania law. Respondent has stipulated that he was so convicted.

The offense - submitting false medicaid claims - is a felony, but it is not a "felony . . . relating to . . . a controlled

substance." These convictions alone cannot be relied upon as a basis for revocation of a DEA registration pursuant to 21 U.S.C. § 824 9a)(2). They may, however, be considered by the Administrtator of DEA as he exercises his discretion in this case. In The Matter of Fourth Street Pharmacy, 52 Fed. Reg. 32068 (1987), aff'd. Fourth Street Pharmacy v. United States Department of Justice, Drug Enforcement Administration, 836 F.2d 1137 (8th Cir., 1988).

The facts surrounding these convictions are set out and discussed at some length in the Opinion And Order of Hearing Examiner issued in a Pennsylvania State administrative proceeding on September 28, 1987. G-%. It appears that Respondent was accused of wrongfully claiming payment from the State for a number of patient x-rays of the complete spine. Although he had taken x-rays of the patients, the x-rays taken were not of the complete spine although they were billed to the State under the "complete spine" code number. It also appears that under another payment code than the one cited by Respondent in his claims to the State, he would have been entitled to receive exactly the same amount in payment for

the x-rays he did take as for the complete spine x-rays which he did not take. Respondent asserted, at trial and in the State administrative proceeding, that the root of the matter amounted to nothing more than a billing error on his part, citing the wrong "billing code." The State hearing examinder found these circumstances to be so mitigatring that he ordered simply a public reprimand for Respondent. G-5, p. 17.

This Federal administrative tribunal, like the Pennsylvania State hearing examiner, will not indepentently examine the evidence to make a determination as to Respondent's guilt of the crimes with which he was charged. In the Matter Of Feridun Gundry, 45 Fed. Reg. 66250 (1980). Respondent's guilt was established in the criminal court proceeding. But the circumstances leading up to conviction may be considered, together with the convictions themselves.